

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRYAN MICHAEL FERGASON,

Petitioner,

v.

BRIAN WILLIAMSON, et al.,

Respondents.

Case No. 2:19-cv-00946-GMN-BNW

ORDER

I. Introduction

This is a habeas corpus action under 28 U.S.C. § 2254. Currently before the court are two motions. Petitioner Bryan Ferguson has filed a motion for leave to conduct discovery. ECF No. 34. Respondents have filed a motion to dismiss. ECF No. 42. The court grants the motion to dismiss in part because one ground is procedurally defaulted and because one ground is a claim of a violation of the Fourth Amendment that is not addressable in federal habeas corpus. Two other grounds, in their current form, are procedurally defaulted, but discovery and Ferguson's investigation might transform the grounds such that Ferguson can overcome the procedural default. The court denies the motion to dismiss regarding these two grounds. The court finds that Ferguson has shown good cause to conduct discovery, and the court grants that motion.

II. Procedural History

After a jury trial in state district court, Ferguson was convicted of one count of conspiracy to possess stolen property and/or to commit burglary and 25 counts of possession of stolen property. Ex. 98 (ECF No. 45-18). Ferguson appealed. Ex. 82 (ECF No. 45-2). The Nevada Supreme Court affirmed. Ex. 112 (ECF No. 45-32).

Ferguson filed a proper-person post-conviction habeas corpus petition. Ex. 117 (ECF No. 45-37). The state district court denied the petition. Ex. 130 (ECF No. 46-10). Ferguson appealed for the first time. Ex. 122 (ECF No. 46-2). The Nevada Supreme Court reversed and remanded for appointment of counsel. Ex. 149 (ECF No. 46-29). The state district court appointed counsel. Ex. 156 (ECF No. 46-36). Ferguson then filed a counseled supplemental petition. Ex. 157 (ECF No. 46-37). The state district court held an evidentiary hearing. Ex. 164 (ECF No. 47-4). The state district court denied the petition. Ex. 166 (ECF No. 47-6). Ferguson appealed for the second time. Ex. 168 (ECF No. 47-8). One of the issues that he raised was that the state district court addressed only the claims in the supplemental petition, ignoring the claims in the original petition. Ex. 179 (ECF No. 47-19). The Nevada Supreme Court transferred the appeal to the Nevada Court of Appeals. Ex. 182 (ECF No. 47-22). The Nevada Court of Appeals dismissed the appeal. Ex. 184 (ECF No. 47-24). That court ruled that the district court did not address all of Ferguson's claims, that the district court's order thus was not a final order, and that Ferguson thus was appealing from a non-appealable order. *Id.* The state district court entered an amended decision. Ex. 200 (ECF No. 48). Ferguson appealed for the third time. Ex. 190 (ECF No. 47-30). The Nevada Supreme Court affirmed. Ex. 214 (ECF No. 47-14).

III. Legal Standard

A. Exhaustion of State-Court Remedies

Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, the petitioner must fairly present that ground to the state's highest court, describing the operative facts and legal theory, and give that court the opportunity to address and resolve the ground. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Anderson v. Harless*, 459

U.S. 4, 6 (1982). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

B. Fourth-Amendment Claims

If the petitioner had a full and fair opportunity in state court to litigate a claim of a violation of the Fourth Amendment, then that claim is not addressable in federal habeas corpus. Stone v. Powell, 428 U.S. 465, 494 (1976).

C. Discovery

Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") states, "A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." If, through "specific allegations before the court," the petitioner can "show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)). The Court noted that while the facts of Bracy made it an abuse of discretion not to allow discovery, "Rule 6(a) makes it clear that the scope and extent of such discovery is a matter confided to the discretion of the District Court." Bracy, 520 U.S. at 909.

IV. Discussion

A. Grounds Two(B), Two(C), and Two(D) Are Unexhausted

1. Ground Two(B)

Ground Two(B) is a claim that trial counsel provided ineffective assistance. After the jury announced its verdict, the state district judge commented about Ferguson's criminal history. The judge made similar comments at Ferguson's sentencing hearing as well as at hearings of Ferguson's co-defendants. Ferguson claims that trial counsel should have sought recusal of the judge before sentencing. Ferguson raised this claim in his proper-person state post-conviction habeas corpus petition. Ex. 117 (ECF No. 45-37 at 13-14). Ferguson did not raise this claim in

1 the final post-conviction appeal. Ex. 206 (ECF No. 48-6). Ferguson admits that he has not fairly
 2 presented Ground Two(B) to the state courts. ECF No. 33 at 12. Ground Two(B) is unexhausted.

3 **2. Grounds Two(C) and Two(D)**

4 Ground Two(C) is a claim that trial counsel failed to hire an expert to provide a valuation
 5 for the stolen property. Ferguson raised this claim as Ground One(B) of his original proper-
 6 person state post-conviction petition. Ex. 117 (ECF No. 45-37 at 15-16). This claim was one of
 7 the claims that the state district court did not address in its second denial of the state post-
 8 conviction petition. In the appeal from that denial, Ferguson argued that the proper-person
 9 petition raised issues of cumulative error that warranted relief, and he mentioned this claim as one
 10 of many examples. Ex. 179 at 39 (ECF No. 47-19 at 45). The Nevada Court of Appeals
 11 dismissed the appeal because the state district court had not entered a final order that addressed
 12 all of Ferguson's claims. Ex. 184 (ECF No. 47-24). The state district court then entered an
 13 amended decision that addressed the claim. Ex. 200 (ECF No. 48). In the appeal from that
 14 denial, Ferguson did not raise this claim as an issue. Ex. 206 (ECF No. 48-6).

15 Ground Two(D) is a claim that trial counsel failed to object to PowerPoint slides that the
 16 prosecutor used in the opening statement that contained photographs of Ferguson and co-
 17 defendants with the word "GUILTY" superimposed over the photographs. Ferguson raised this
 18 claim as Ground Four of his supplemental state petition. Ex. 157 (ECF No. 46-37 at 87-95).¹
 19 The state district court addressed this claim in its second denial of the post-conviction petition:

20 Trial counsel was adamant in her testimony that if photos on the State's opening
 21 PowerPoint would have flashed the word "guilty" across any faces, she would
 22 have acted accordingly. Additionally, the State has correctly pointed out that
 23 Defendant's first Petition makes no mention of this occurring at opening, and only
 notes it happening during closing arguments. The Court finds that no photos with
 the word "guilty" superimposed were shown during State's opening argument.

24 Ex. 166 at 7 (ECF No. 47-6 at 8). Ferguson did raise this issue on appeal from the second denial.
 25 Ex. 179 at 47-51 (ECF No. 47-19 at 53-57). The Nevada Court of Appeals dismissed the appeal
 26 because the state district court had not entered a final order that addressed all of Ferguson's

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 28 ¹ In the original proper-person state petition, Ferguson alleged that the prosecution showed these slides to the jury
 during closing argument, not the opening statement. Ex. 117 (ECF No. 45-37 at 14).

1 claims. Ex. 184 (ECF No. 47-24). The state district court then entered an amended decision
2 accordingly. Ex. 200 (ECF No. 48). In the appeal from that denial, Ferguson did not raise this
3 claim as an issue. Ex. 206 (ECF No. 48-6).

4 Petitioner initially stated that, along with Ground Two(B), he has not fairly presented
5 Grounds Two(C) and Two(D) to the state courts. ECF No. 33 at 12. He now argues that he
6 presented Grounds Two(C) and Two(D) to the state courts in his second post-conviction appeal.
7 ECF No. 56 at 6.

8 The court disagrees. "[S]tate prisoners must give the state courts one full opportunity to
9 resolve any constitutional issues by invoking one complete round of the State's established
10 appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Even if Ferguson
11 fairly presented the claims now in Ground Two(C) and Two(D) to the Nevada appellate courts in
12 his second post-conviction appeal, the Nevada Court of Appeals dismissed the appeal because the
13 state district court had not yet entered a final order that disposed of all of Ferguson's claims. Ex.
14 184 (ECF No. 47-24). Ferguson characterizes the order dismissing the appeal as a remand for the
15 state district court to explicitly resolve all of his claims. ECF No. 56 at 7. Either way, the
16 outcome is the same. At that point in the proceedings, Ferguson had not yet gone through one
17 complete round of state post-conviction proceedings. See Boerckel, 526 U.S. at 845.

18 The court is not persuaded by Ferguson's argument that the Nevada Court of Appeals
19 could have construed the state district court's order as summarily denying any claims not
20 explicitly mentioned. ECF No. 56 at 8. When the state district court denied the petition at the
21 end of the evidentiary hearing, Ferguson's counsel asked respondents' counsel, who was preparing
22 the decision, to include the denials of all the grounds in the proper-person petition. Ex. 164 at 56
23 (ECF No. 47-4 at 57). Then, on appeal, Ferguson argued that the state district court did not
24 include those denials. Ex. 184 at 1 (ECF No. 47-24 at 2). The Nevada Court of Appeals
25 dismissed the appeal based upon Ferguson's argument. Ex. 179 at 26-41 (ECF No. 47-19 at 32-
26 47). This court cannot now say that the Nevada Court of Appeals had and passed on the
27 opportunity to rule on fairly presented claims when that court did exactly what Ferguson asked.
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B. Grounds Two(B), Two(C), and Two(D) Are Procedurally Defaulted

If Fergason were to return to state court to exhaust these grounds, he would face the state-law procedural bars for an untimely and successive petition. See Nev. Rev. Stat. §§ 34.726, 34.810. A state district court can excuse those procedural bars if Fergason can demonstrate cause and prejudice.

A procedural default of a claim of ineffective assistance of trial counsel may be excused "where (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.'" Trevino v. Thaler, 569 U.S. 413, 423 (2013) (citing Martinez v. Ryan, 566 U.S. 1, 13-16 (2012)). "The rule of Coleman v. Thompson, 501 U.S. 722 (1991)] governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." Martinez, 566 U.S. 1 (2012) (emphasis added).

Fergason has no argument for cause and prejudice other than Martinez. He acknowledges that Martinez does not apply for procedural defaults that occurred because claims are not raised on post-conviction appeal. ECF No. 56 at 10. He also notes that Nevada has not adopted Martinez for its procedural bars. Id. (citing Brown v. McDaniel, 331 P.3d 867 (Nev. 2014)). For Ground Two(B), he has no proposal how Martinez might excuse the procedural default. The court thus dismisses Ground Two(B).

C. The Court Denies in Part the Motion to Dismiss Regarding Grounds Two(C) and Two(D), and the Court Grants the Motion for Leave to Conduct Discovery

Fergason has a proposal for Grounds Two(C) and Two(D) not being exhausted. First, he is trying on his own to obtain an expert valuation for the stolen property, and he is seeking discovery to require respondents to turn over the PowerPoint slides showing his photograph with

1 the word "GUILTY" superimposed over it. ECF No. 56 at 10. That evidence would make
2 Grounds Two(C) and Two(D) new claims that the state courts would not have considered. Id.
3 Grounds Two(C) and Two(D) would be unexhausted not because Ferguson failed to raise them on
4 appeal, but because Ferguson's post-conviction counsel did not raise them in the state district
5 court. Grounds Two(C) and Two(D) also would be procedurally defaulted and technically
6 exhausted, because the state courts will not consider Ferguson's Martinez argument. Then this
7 court could consider Ferguson's Martinez argument. Then, if the court agrees with Ferguson's
8 Martinez argument, he can get de novo review of Grounds Two(C) and Two(D) in federal court,
9 without ever presenting the new claims to the state courts. In effect, Ferguson is not trying to
10 save his claims from procedural default, but he is intentionally trying to procedurally default his
11 claims to take advantage of Martinez.

12 This case is in a posture where dissenting opinions in two cases provide more guidance
13 than the majority opinions. The Supreme Court held that a federal court's review of a state court's
14 decision of a claim on the merits under 28 U.S.C. § 2254(d)(1) is limited to the record before the
15 state court at the time of the decision. Cullen v. Pinholster, 563 U.S. 170 (2011). In dissent,
16 Justice Sotomayor noted that this created a problem. She gave a hypothetical example of a person
17 who claimed in state court that the prosecution had withheld exculpatory witness statements in
18 violation of Brady v. Maryland, 373 U.S. 83 (1963). The state court denied the claim because the
19 known withheld evidence was not material under Brady. The person then finds that the
20 prosecution had withheld other exculpatory statements, but under state law the person could not
21 present the new evidence in a successive petition. Pinholster, 563 U.S. at 214-15 (Sotomayor, J.,
22 dissenting). Justice Sotomayor noted that if the person never had presented the Brady claim at all
23 to the state courts, then it would be procedurally defaulted, and the person could try to show cause
24 and prejudice to excuse the default. Id. at 215. However, under the hypothetical she presented,
25 the state courts denied the Brady claim on the merits, and while it might have been a reasonable
26 application of Brady based upon the state record as it existed then, it might no longer be
27 reasonable when considering both the old evidence and the new evidence. Id. With the decision
28 in Pinholster, under 28 U.S.C. § 2254(d)(1) a federal court would be prohibited from considering

1 the new evidence in determining whether the state-court decision was reasonable. Id. Thus, she
2 concluded, "suggests the anomalous result that petitioners with new claims based on newly
3 obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their
4 default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits
5 in state court cannot obtain federal habeas relief if they cannot first satisfy 28 U.S.C. § 2254(d)(1)
6 without the new evidence." Id. In other words, if there is newly obtained evidence, it is better for
7 the petitioner that the claim be procedurally defaulted instead of adjudicated on the merits in state
8 court.

9 The majority suggested that Justice Sotomayor's hypothetical might be a new claim that
10 the state courts had not adjudicated on the merits. 563 U.S. at 186 n.10. She responded that new
11 evidence in the hypothetical she described usually is not considered a new claim but additional
12 proof in support of an existing claim. Id. at 216. She noted again that such a new claim would
13 mean that a petitioner could obtain de novo federal review if the petitioner could demonstrate
14 cause and prejudice, instead of the deferential review of § 2254(d)(1) that Congress intended. Id.

15 Later, after the Supreme Court decided Martinez, the Ninth Circuit held that a petitioner
16 who presented a new claim of ineffective assistance of trial counsel could obtain de novo review
17 of that claim if the claim was procedurally defaulted and if the ineffective assistance of post-
18 conviction counsel was the cause for that default. Dickens v. Ryan, 740 F.3d 1302 (9th Cir.
19 2014) (en banc). If newly discovered evidence puts a claim already adjudicated on the merits in
20 state court into a "significantly different and stronger evidentiary posture," then it is unexhausted.
21 Id. at 1318 (quoting Aiken v. Spalding, 841 F.2d 881 (9th Cir. 1988)). The ground then would be
22 procedurally defaulted because the state courts—Arizona in Dickens, Nevada in this case—have
23 not adopted Martinez as an excuse for their state-law procedural bars. The state courts would
24 apply the procedural bars to dismiss the state petition, and thus returning to the state courts to
25 exhaust the claims would be futile. Then the petitioner could demonstrate cause and prejudice in
26 federal court by showing that post-conviction counsel was ineffective under Martinez. Then the
27 petitioner can obtain de novo review of the claim in federal court. Judge Callahan noted that this
28 holding turned the cases that Dickens relied upon completely around. In Aiken and Nevius v.

1 Sumner, 852 F.2d 463 (Nev. 1988), the Ninth Circuit told the petitioners that they needed to
 2 present their new evidence to the state courts first before presenting that evidence to the federal
 3 courts. Now, Dickens' application of Aiken and Nevius means that a petitioner can obtain de
 4 novo review without even trying to present the evidence to the state courts. Dickens, 740 F.3d at
 5 1330-32 (Callahan, J., dissenting in part).

6 That is the situation now before the court. Again, Ferguson is not trying to use Martinez
 7 to save procedurally defaulted claims from dismissal. Ferguson is trying to procedurally default
 8 his grounds to use Martinez to gain de novo review of the claims.² Yet, what Ferguson proposes
 9 would result in nothing different in what Dickens held and Pinholster suggested in its footnote 10.
 10 In state court, Ferguson's claim that trial counsel should have obtained an expert opinion on the
 11 value of the stolen property had no evidentiary support, and his claim that trial counsel should
 12 have objected to the PowerPoint slide with the word "GUILTY" superimposed over his
 13 photograph had only his testimony against his former counsel's testimony. If Ferguson can obtain
 14 an expert valuation, which he is trying on his own, and if Ferguson can obtain the PowerPoint
 15 slides used in the opening statement, for which he is seeking discovery, then Grounds Two(C)
 16 and Two(D) would be in significantly different and stronger evidentiary postures. They would be
 17 new claims. Dickens would be controlling precedent, and Ferguson could obtain de novo review
 18 of the claims in this court.

19 The court thus finds that Ferguson has shown good cause for discovery. See Bracy, 520
 20 U.S. at 908-09. If Ferguson does obtain the evidence that he is seeking, then he may move for
 21 leave to amend his petition to include that evidence. If he does so move, and if the court grants
 22 the motion, then the court will decide at that time how respondents should respond to the newly
 23 amended petition. If Ferguson does not obtain the evidence that he is seeking, then he will need
 24 to file a status report stating as much, and the court will decide at that time how respondents
 25 should respond again to the current amended petition (ECF No. 33).

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 28 ² The court is not saying that Ferguson has held back evidence intentionally. The court is saying only that Ferguson is taking advantage of the distortions that the dissents in Pinholster and Dickens predicted accurately.

1 The court's leave is not necessary for obtaining the expert valuation—again, Ferguson is
2 trying to obtain that on his own—but the court will set the same deadline for finding that evidence
3 in support of Ground Two(C) as it sets for the discovery in support of Ground Two(D). If
4 Ferguson cannot obtain that valuation by then, he probably cannot obtain it at all.

5 The court also denies in part the motion to dismiss regarding Grounds Two(C) and
6 Two(D). If everything works out in Ferguson's favor, then Grounds Two(C) and Two(D) still
7 will be procedurally defaulted, but in a way that he can overcome the procedural default through
8 Martinez. Requiring Ferguson to decide what to do with Grounds Two(C) and Two(D) would be
9 premature.

10 **D. Ferguson's Argument Regarding State-Court Delays Is Moot**

11 Ferguson argues that this court should not find Grounds Two(B), Two(C), and Two(D) to
12 be unexhausted because his state post-conviction proceedings had serious delays over nearly eight
13 years, and the court should not subject him to another possible eight years if he needs to return to
14 state court. ECF No. 56 at 3-5. However, as the court has found above, Ground Two(B) is
15 procedurally defaulted and Martinez is inapplicable, and the court is dismissing it. The court is
16 deferring action on the failure to exhaust Grounds Two(C) and Two(D), so Ferguson faces no risk
17 now of returning to state court. Ferguson's argument about delay thus is moot.

18 **E. The Court Dismisses Ground One**

19 Respondents argue that Ground One, a claim of a violation of the Fourth Amendment, is
20 not addressable in federal habeas corpus because Ferguson had a full and fair opportunity to
21 litigate the claim in the state courts. ECF No. 42 at 9-10 (citing Stone v. Powell, 428 U.S. at 494.
22 Ferguson argues that he did not have a full and fair opportunity to litigate the issue because the
23 state district court denied his request for an evidentiary hearing for necessary fact-finding. ECF
24 No. 56 at 11-12. This issue is complicated because it involves three separate criminal cases and
25 Ferguson's co-defendant Daimon Monroe. After analyzing Ferguson's argument, the court
26 concludes that Ferguson did have a full and fair opportunity to litigate the claim in the state
27 courts.
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1 First, Fergason was on probation in a criminal case that otherwise is unrelated to the
2 current case. Second, Fergason and Hoyt were arrested for the burglary of the Anku Crystal
3 Palace, a shop that sold crystals and East Asian statues. The events of Fergason's detention and
4 arrest are the basis of the Fourth Amendment claim. Third, while in jail awaiting the disposition
5 of the Anku Crystal Palace case, Fergason made phone calls that were recorded. The
6 investigation that followed led to the case that is now before the court.

7 The prosecution sought to revoke Fergason's probation in the otherwise unrelated case.
8 Fergason litigated a motion to suppress regarding his detention and arrest. The arguments were
9 similar to those that he raises now in Ground One. The state district court held oral argument.
10 The state district court denied the motion to suppress without holding an evidentiary hearing.
11 ECF No. 56 at 13.

12 In the Anku Crystal Palace case, both Fergason and Monroe made oral arguments at the
13 preliminary hearing, challenging the legality of the police stopping them. The justice court did
14 not consider the oral motions. ECF No. 56 at 13.

15 In the Anku Crystal Palace case, in the state district court, Monroe filed a motion to
16 suppress regarding the police stop. The arguments were similar to the arguments that Fergason
17 raised in Ground One. The state district court denied the motion without conducting an
18 evidentiary hearing. The state district court noted that it recently had denied Fergason's
19 analogous motion in the probation-revocation proceedings. ECF No. 56 at 13.

20 In the Anku Crystal Palace case, Monroe raised the Fourth Amendment claim on direct
21 appeal. He argued (1) that the initial traffic stop was improper and, even if it was proper, the
22 scope of the investigation exceeded the justification for the stop; (2) there was no reason for the
23 police to search the van initially as a protective sweep, during which they found a glass object
24 that they connected to the Anku break-in; and (3) the trial court had erroneously denied the
25 suppression motion without holding an evidentiary hearing, because there were disputed factual
26 issues. ECF No. 56 at 14. The Nevada Supreme Court reversed and remanded Monroe's
27 conviction. It held that the state district court should have held an evidentiary hearing on
28 Monroe's motion, instead of relying on the conclusions that it had reached during the evidentiary

1 hearing in Ferguson's probation-revocation case. The mention of the evidentiary hearing was
2 erroneous, because an evidentiary hearing did not occur in Ferguson's probation-revocation case.
3 Nonetheless, Monroe prevailed. Without specific factual findings, the Nevada Supreme Court
4 was unable to conclude that the prosecution had met its burden of proof. ECF No. 56 at 14.

5 In the Anku Crystal Palace Case, back in the state district court Monroe and the
6 prosecution then negotiated a guilty-plea agreement. ECF No. 56 at 15.

7 In the instant, stolen-property case, Ferguson and Monroe both filed motions to suppress.
8 The state district court severed the trials of Monroe and Ferguson, and Monroe's trial occurred
9 first. The court heard oral argument about both motions at the start of Monroe's trial. The state
10 district court denied the motions orally without holding an evidentiary hearing. ECF No. 56 at
11 15.

12 In the stolen-property case, on direct appeal, Ferguson raised a Fourth Amendment claim.
13 The Nevada Supreme Court affirmed. ECF No. 56 at 15.

14 In the stolen-property case, on direct appeal, Monroe also raised a Fourth Amendment
15 claim. The Nevada Supreme Court affirmed. Its reasoning was materially identical to the
16 reasoning in Ferguson's appeal. ECF No. 56 at 16.

17 In the instant, stolen-property case, Ferguson did not argue that the state district court
18 should have held an evidentiary hearing. Ex. 101 (ECF No. 45-21). In contrast, in the Anku
19 Crystal Palace Case, Monroe did argue that the state district court should have held an evidentiary
20 hearing. P. Ex. 12 at 20 (ECF No. 57-12 at 22). It worked. The Nevada Supreme Court agreed
21 with Monroe and remanded for an evidentiary hearing. P. Ex. 15 (ECF No. 57-15). Although the
22 Nevada Supreme Court stated erroneously in Monroe's appeal that Ferguson had an evidentiary
23 hearing in the probation-revocation case, Ferguson easily could have corrected that error in his
24 own appellate brief, if he had raised the issue.

25 Ferguson had the same opportunity as Monroe to litigate the Fourth Amendment issue.
26 Ferguson did not take that opportunity. For the purposes of Stone v. Powell, it does not matter
27 that he did not avail himself of that opportunity; it only matters that the opportunity was present.
28 The court dismisses Ground One.

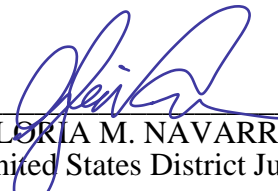
1 **V. Conclusion**

2 IT THEREFORE IS ORDERED that petitioner's motion for leave to conduct discovery
3 (ECF No. 34) is **GRANTED**. Petitioner must complete discovery within 60 days of the date of
4 entry of this order.

5 IT FURTHER IS ORDERED that, within 28 days of the completion of discovery,
6 petitioner must file a motion for leave to amend the petition, a status report stating that he will
7 stand on his current amended petition (ECF No. 33), or any other appropriate motion.

8 IT FURTHER IS ORDERED that respondents' motion to dismiss (ECF No. 42) is
9 **GRANTED** in part. The court dismisses Grounds One and Two(B) with prejudice. The court
10 **DENIES** in part the motion to dismiss with respect to Grounds Two(C) and Two(D).

11 DATED: September 30, 2021

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14 GLORIA M. NAVARRO
15 United States District Judge
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